(3)

Supreme Court, U.S.
FILED
DEC 10 1998
CLERK

No. 98-752

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DEPARTMENT OF ENVIRONMENTAL PROTECTION
of the State of Florida,

Petitioner,

v.

BOUCHARD TRANSPORTATION COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

---

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

ROBERT A. BUTTERWORTH
Attorney General of Florida

DENIS DEAN
Special Counsel
(Counsel of Record for Petitioner)
CHARLES R. MCCOY
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

7 pp

QUESTIONS PRESENTED

I. Whether the Eleventh Amendment allows an admiralty court to compel a state to file or forfeit claims in a proceeding under the Limitation of Liability Act.

II. Whether private vessel owners proceeding under the Limitation of Liability Act may bring, in response to a state's compelled maritime claim, common or state law counterclaims for damages which would be barred by the Eleventh Amendment.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REPLY TO RESPONDENTS' STATEMENT 1

REPLY TO RESPONDENTS' ARGUMENT 2

The Eleventh Amendment Questions Presented By Petitioner Are Not Entwined With The Statutory Interpretation Issues Raised By Respondents In A Separate Petition For Certiorari (Case No. 98-682).

CONCLUSION 3

TABLE OF AUTHORITIES

Cases **Page(s)**

Bouchard v. United States, case no. 98-682 (U.S.) ..... *passim*

Other Authority

Eleventh Amendment ..... *passim*

Oil Pollution Act of 1990 ..... *passim*

Limitation of Liability Act ..... *passim*

Fed.R.Civ.P., Supp. Rule F. ..... *passim*

No. 98-752

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

DEPARTMENT OF ENVIRONMENTAL PROTECTION
of the State of Florida,

Petitioner,

v.

BOUCHARD TRANSPORTATION COMPANY, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Eleventh Circuit

---

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

REPLY TO RESPONDENTS' "COUNTER-STATEMENT"

The first numbered paragraph in Respondents' "counter-statement" is mistaken and reveals Respondents' misunderstanding of the law. The substantive right under which the case was brought is statutory; that is, the right to limit liability under the 1851 Limitation of Liability Act. In contrast, Supplemental Rule F is the device for effectuating that right. It is Respondents' use of the Limitation Act, as applied through Rule F to compel Florida into federal court, which offends the Eleventh Amendment.

As Respondents necessarily concede, Florida's maritime claim was subject to the 60-day deadline of Rule F. Respondents contend the other claims were subject to other deadlines under the Oil Spill Act of 1990 and state law. Regardless of the actual number of days to present a claim, the Florida Department of Environmental Protection (DEP) was forced into federal court by a private party invoking the Limitation Act.

REPLY TO RESPONDENTS' ARGUMENT

The Eleventh Amendment Questions Presented By Petitioner Are Not Entwined With The Statutory Interpretation Issues Raised By Respondents In A Separate Petition For Certiorari (Case No. 98-682).

Bouchard concedes it would be appropriate to grant the petition for certiorari by DEP. However, Bouchard attempts to bootstrap its separate and insufficient petition (case no. 98-682) into review, by claiming the two petitions raise entwined issues.

The only common feature of the petitions is that the same, three-vessel collision led to both. DEP's petition raises two Eleventh Amendment questions, which have added importance based on federalism and respect for state sovereignty. In contrast, Bouchard's petition urges only that the Eleventh Circuit interpreted a federal statue incorrectly, albeit consistentlv with another circuit court of appeals. Even if incorrect, the Eleventh Circuit's interpretation leaves Bouchard with the totally adequate and constitutionally acceptable remedy of defending itself in state court.

Otherwise, Bouchard's argument expresses no more than disagreement with the policy choices made by Congress when it enacted the Oil Pollution Act of 1990. Bouchard is free to

disagree, but the proper recourse is in Congress, not this Court. However, this Court is the proper forum for resolving Florida's Eleventh Amendment questions. Bouchard's transparent attempt to take advantage of the strength of DEP's petition must be rejected by this Court.

CONCLUSION

The Court should grant DEP's petition for writ of certiorari in this case, while denying Bouchard's separate petition in case no. 98-682.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General

DENIS DEAN
Special Counsel
(Counsel of Record for Petitioner)
Florida Bar No. 096607

CHARLES R. MCCOY
Assistant Attorney General
Florida Bar No. 333646

Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
(850) 414-3300

December 1998
<charles>bouchard\reply.wpd